Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RAMONA CONVENT OF THE HOLY NAMES,
Petitioner,
vs.
CITY OF ALHAMBRA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION THREE

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a religious institution properly pleads that governmental action substantially burdens the free exercise of religion as secured in the First Amendment to the United States Constitution and the Religious Freedom Restoration Act of 1993 (42 U.S.C. § 2000bb *et seq.*), may a state trial court consistently with the Due Process Clause summarily determine, and a court of appeal affirm, a finding to the contrary when the issue was not framed in the summary adjudication motion and not addressed in the trial court order granting summary adjudication or in the subsequent judgment, and neither the substantive contentions raised by the religious institution nor the dispositive decisional authority of this Court are ever addressed by either court?

2. Does a City substantially burden the free exercise of religion, and violate the rights of a religious order to just compensation and equal protection of the laws when, through rezoning and other regulatory acts, it designates a school site belonging to that religious order as a public facility classification, when that designation destroys all use or potential for sale or development of the property and prevents the religious institution from securing the funds necessary to ensure its continued operation?

3. Are the rights of a religious order to due process of law violated when a trial court grants, and a court of appeal affirms, summary adjudication in favor of an adverse moving party that offers no evidence whatsoever in support of the theory underlying its motion (that the religious order's school site retains economically beneficial or productive use following regulatory action), and where all the evidence in the record on the issue is that the school site retains no such use?

4. When a landowner, after an unsuccessful application for a particular land use is denied, seeks an alternative use in compliance with this Court's opinion in *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), is a state court ruling that a decision upholding the earlier denial has a res judicata and collateral estoppel effect on all further applications consistent with the dictates of the Constitution and the law of this Court?

PARTIES TO THE PROCEEDING

Petitioner Ramona Convent of the Holy Names of Jesus and Mary (Ramona Convent) was plaintiff and appellant below. Respondents (defendants and respondents below) are the City of Alhambra, a California municipal corporation, and Michael A. Blanco, Mary Louise Bunker, Talmage V. Burke, Boyd G. Condie and Barbara Messina, individually and as members of the City Council of the City of Alhambra.

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PETITION FOR WRIT OF CERTIORARI

Ramona Convent respectfully seeks certiorari to review the judgment of the Court of Appeal, State of California, Second Appellate District, Division Three.

OPINIONS BELOW

The December 20, 1993, published decision of the Court of Appeal of the State of California, Second Appellate District, Division Three, reported at 21 Cal.App.4th 10 and 26 Cal.Rptr.2d 140, is reproduced herein as Petitioner's Appendix B1-17. The January 10, 1994, order of the same court denying rehearing is reproduced herein as Petitioner's Appendix C. The subsequent (April 13, 1994) order of the Supreme Court of the State of California, denying review in this matter, is reproduced herein as Petitioner's Appendix A. An earlier (September 4, 1992) unpublished opinion in this action, also from the Second Appellate District, Division Three, is reproduced herein as Petitioner's Appendix D1-9. A subsequent (June 6, 1994) order of the Court of Appeal, Second Appellate District, Division Three, is reproduced herein as Petitioner's Appendix H1-3.

The April 14, 1992, judgment of the Superior Court of the State of California in this same action, is reproduced herein as Petitioner's Appendix E1-5. The December 13, 1991, Findings And Order Re Motion For Summary Adjudication Of Issues are reproduced herein as Petitioner's Appendix F1-3.

JURISDICTION

This is an action for deprivation of rights secured by the free exercise clause of the First Amendment to the United States Constitution, and denial of due process of law, equal protection of the laws and just compensation in violation of

the Fifth and Fourteenth Amendments to the United States Constitution and the Civil Rights Act (42 U.S.C. § 1983). These claims arise out of regulatory and administrative acts by the City of Alhambra impairing the use of Ramona Convent's land.

On April 13, 1994, the Supreme Court of California denied Ramona Convent's petition for review. The decision of the Court of Appeal of the State of California, Second District, Division Three, which triggered the petition for review, was issued December 20, 1994.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment, United States Constitution:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . ."

Fifth Amendment, United States Constitution:

> "nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

> "Section 1 . . . nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"

42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdic-

> tion thereof to the deprivation of any rights, privileges, and immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. § 2000bb:

> "The Congress finds that . . . laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise . . ."

42 U.S.C. § 2000bb-1:

> "(a) Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
>
> (b) Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest."

42 U.S.C. § 2000bb-2:

> "As used in this Act . . . (3) the term 'demonstrates' means meets the burdens of going forward with the evidence and of persuasion . . ."

City of Alhambra ordinance number 23.34 is reproduced herein as Petitioner's Appendix G1-3.

STATEMENT OF THE CASE

A. The Ramona Convent School: Alhambra's Crown Jewel

Since it was established in 1889 by the same family that founded the City of Alhambra, the nonprofit Ramona Convent secondary school has been a vital part of that community. (CT 3:11-20, 80)[1] For over a century, it has educated young women in a superb college-preparation program. It has enjoyed particular success with disadvantaged students, many of whom have returned to the City with professional degrees to the significant benefit of that community. (CT 338:18-339:2) Because a large part of its student body is economically disadvantaged, the school has traditionally been pressed for funds. As an institution of a regular church order, the school has access to neither diocesan funds nor tax revenues. By the mid-1980's the financial stress had segued into catastrophe; the 1987 Whittier earthquake severely damaged the 98-year old main building, which the City then condemned as unsafe. (CT 339:17-19) Ramona Convent was forced to borrow over $1,000,000 for demolition and replacement, which it must repay. (CT 4:16-19, 5:3, 338:6-10, 340:21-24)

Reality compelled the conclusion that Ramona Convent had only one source of funds: its sole marketable asset, its excess land. (CT 340:12-15) The school had avoided threatened closure once before in this manner (in 1979, it sold five acres, on which a condominium complex was built; CT 339:5-9, 340:17-21). It determined to sever an unimproved 1.97 acre lot (the Property) from the 19.17 acre school site (the School Site), used for occasional recreation activities such as softball, but unnecessary to the school's

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[1] "CT" and "SCT" refer to the Clerk's Transcript and Supplemental Clerk's Transcript below.

mission, since these recreational activities could be conducted elsewhere. (CT 5:24-28, 340:8-10, 359:25)

B. The Offending City Acts: Conscripting Ramona Convent's Property

Prior to 1986, the School Site, like all surrounding properties, had been zoned for residential development. (CT 40, 236, 339-405) In 1986 — over the strong objection of Ramona Convent — the School Site was spot-zoned to a new Open Space classification. (CT 339:11-15; App. G)[2]

The ostensibly "Open Space" zone was in fact not an open space zone; indeed, the City repeatedly acknowledged in its briefing that the label is "misleading" (RB 9, 13), and conceded in subsequent trial court proceedings in a related case that "while it is denominated open space," the City's zone "is really kind of a public facility zone." Exhibit 2 to Exhibit B, September 8, 1993 Request For Stay Of Argument And For Status Conference. (The Court of Appeal refused to consider this concession, which did no more than underscore what was already apparent from the record, and instead treated the zoning as if it were a legitimate "open space" zone; *see, e.g.*, App. B13-15; 21 Cal.App.4th at 22-23; App. H2.)[3]

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[2] Because this case was scuttled in a dispositive pretrial motion, the record was not fully developed on this issue. On the record, the School Site is the only private property burdened with the "Open Space" zoning. But it was established through judicially noticeable matter (such as City Council minutes) and briefing that while the School Site was initially the only private property placed in the "Open Space" zone, after a Ramona Convent sister inquired as to why the order was being singled out for this "privilege," the City added a few elementary school sites to the zone.

[3] The classification defies Cal. Gov't Code § 65560, which enables open space zoning in California, and categorizes "open-space land" as land "which is essentially unimproved and devoted to an open space use as defined in this section." The statutory definition

(continued)

There are only five uses permitted as of right in the "Open Space" zone: (1) *public* recreational, (2) golf courses and country clubs, (3) flood control channels, (4) public utility rights-of-way, and (5) rivers and similar water courses. (App. G1; CT 275; emphasis added) The only use that is even arguably private is golf courses, and the entire School Site is far too small for that; it has only about one-fifth of the land that would be required for even a compact course.[4]

The City's express purpose in the 1986 general plan designation zone change was to "preserve recreational activities"; the Property is restricted to "recreational open space and school related uses." (CT 182:20-1, 184:3-4) This appears to translate into "public recreational open space such as parks, playgrounds and recreation areas . . ." (CT 275); *private* parks, playgrounds and recreation areas are disallowed.

(fn. continued)
includes land set aside for natural resource management, or "managed production of resources," or for outdoor recreation, and land designated as open space for public health and safety reasons, such as earthquake fault lines and flood plains. Most of the uses ostensibly permitted by the City ordinance are patently beyond the scope of this enabling statute and in conflict with its thrust.

[4] The ordinance also lists twelve conditional uses, *i.e.*, uses that may be allowed on application but are wholly at the City's discretion. These are (1) educational institutions; (2) buildings accessory to the five permitted uses; (3) churches; (4) agricultural and horticultural cultivation; (5) wells, water treatment plants, etc.; (6) utility substations; (7) cemeteries and mausoleums; (8) commercial antennae; (9) police and fire stations; (10) stables and riding academies; (11) libraries and museums; and (12) outdoor nursery storage. Most of these are obviously public, obviously not open space uses, or manifestly unsuited for a relatively small parcel in a dense residential neighborhood. Further, the sisters are religious educators: it is absurd to suggest that they should operate a fire station, a water treatment plant or an equestrian academy.

C. Ramona Convent's Frustrated Efforts To Use Beneficially Or Sell Its Property

In 1987, Ramona Convent received an offer for the 1.97-acre Property from Wonder Enterprises, which wished to construct housing for seniors, a resource in critically short supply in the City. (CT 5:4-7, 76, 92-93, 184:28-185:3) City staff recommended approval and City sponsorship of the proposed project, a *sine qua non* if the project were to proceed. (CT 5:7-10) Wonder Enterprises and Ramona Convent independently filed the timely and proper applications necessary for the permit. Ramona Convent's application sought a tentative parcel map ("lot split") to constitute the 1.97 acre Property as a formal parcel; *this is required under California law* (Cal. Gov't Code §§ 66424, 66426) *as a precondition of sale*. (CT 5:17-20) On July 24, 1989, the City Council overrode the recommendation of its staff and strong public support for the application, and declined to participate in the project, dealing it a death blow. (CT 5:9-11, 8:16-18, 83, 142, 197:9-17)[5]

Ramona Convent, in an effort to work out a fair resolution, has continued to seek an economically beneficial and productive use or just compensation in lieu thereof from the

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[5] This was the primary subject of the initial (unpublished) September 4, 1992, decision of the Court of Appeal (Appendix D). The City did not act on Ramona Convent's lot split application within fifteen days after submission; pursuant to Cal. Gov't Code section 66452.1(b) and Alhambra Municipal Code § 22.40.040, the application was supposedly thus deemed approved. (CT 6:23-7:2) When the matter was finally heard on November 6, 1989, the City pronounced that it would still consider the lot split application on its merits, claiming (totally without contemporaneous evidence) that Ramona Convent had somehow acquiesced in the delay, and summarily denied the application. (CT 76-82, 95-99) The Court of Appeal affirmed.

City. Ramona Convent has made five discrete efforts: objection to the draconian 1986 rezoning, the 1987 application for a use-neutral lot split, urging the City to acquire the Property by purchase (*see* Cal. Gov't Code § 51073), and subsequent applications for appropriate uses under R-3 and R-1 classifications, the last affecting the entire School Site.

D. In The Courts: Rubber-Stamp Deference Given To City And Lower Court Decisions, Sometimes Even When Such Decisions Were Not Made

On March 16, 1990, Ramona Convent filed in the Los Angeles Superior Court a verified petition for a writ of mandate and a complaint against the City and City Council members individually and in their official capacities, framing claims for relief in mandamus, administrative mandamus, inverse condemnation, interference with the free exercise of religion and deprivation of civil rights (42 U.S.C. § 1983). (CT 1-16) On September 11, 1990, Ramona Convent moved for a peremptory writ of mandate. (CT 99-246, 285-90) The October 8, 1990, denial of that motion was reviewed in the September 4, 1992, Court of Appeal decision. (Appendix D)

On June 1, 1991, the City successfully moved for summary adjudication. (CT 291-330, 436-76) Its motion was based on a solitary declaration (of chief planner, P. Michael Paules (CT 458-61)), which only authenticated and summarized the "open space" ordinance and recited some procedural history. It said *nothing* about *either* the burdens placed on Ramona's free exercise of religion as expressed through the operation of the secondary school *or* the economic feasibility of the ostensibly permitted uses. The only evidence that did so was presented in opposition by Sister Marion Patrick and Ramona Convent appraiser James J. Reid. Sister Patrick's unrefuted evidence was that the existing educational use was not economically viable, and that the

zoning change and subsequent denials burdened Ramona Convent's religious mission to a degree that threatened the very survival of the school. (CT 340:17-18) Mr. Reid's unrefuted evidence was that the uses ostensibly permitted by the ordinance were "public or quasi-public in nature . . . [s]uch uses are of no practical use or value to a private property owner like Ramona Convent." (SCT 33)

In its motion for summary adjudication, *the City did not so much as mention the deprivation of free exercise claim* framed in the Fourth Cause of Action of the complaint. (CT 11-12)[6] After Ramona Convent pointed out this curious lack of even an effort at proof (CT 17-21), the City still offered no evidence or authority in support of its position, restricting its rebuttal to an offensive *ad hominem* riposte by its counsel that accused the sisters of seeking "the right to make large amounts of money on real estate speculation." (CT 428)

The *entire* consideration of the Fourth Cause of Action in the trial court's order granting summary adjudication, never even mentioned the City; it provided:

> The court further finds as to the fourth cause of action individual defendants named in plaintiff's complaint are immune from liability herein pursuant to 42 U.S.C. section 1993 [*sic*]. See cases cited by defendant in their motion, *Ibid*, in paragraph 5, starting at p. 10, l. 9 *et seq*. (CT 562:16-20)

The language in the judgment dealing with the Fourth Cause of Action is identical. (SCT 42:1-5)

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[6] The Fourth Cause of Action also addressed the liability of the individual defendants. Immunity of these defendants was an issue, but the City never claimed that it was itself immune. *See Monell v. Dep't of Social Services of the City of New York*, 436 U.S. 658, 694-701 (1978).

In other words, as to the free exercise claim against the City, the trial court was stone silent, but it dismissed the action anyway. The Court of Appeal thus affirmed a non-ruling; its consideration of the free exercise claim (App. B16; 21 Cal.App.4th at 24-25) was perfunctory and dismissive, mentioning *neither* the substantive free exercise claim advanced by Ramona Convent, *nor* the curious manner of how the claim had been disposed of in the trial court, and *citing no authority whatever in support of its ruling.*

Subsequent to the matters which culminated in the case at bench, Ramona Convent applied for a different zoning change on the Property than that sought before, which the City duly denied. On July 6, 1994, the Court of Appeal — responding to a petition for a writ of mandate from the City — issued an order requiring the trial court to vacate its order denying judgment on the pleadings to the City in the action arising out of the new application or to show cause why it should not do so. (Case No. B084886; the order is reproduced as Appendix H.) The apparent rationale of the order is "the fact the property is both zoned as open space and designed as open space under the land use element of City's general plan" (*sic*; App. H2), and the apparent effect of the order is to relieve the City of its obligation to consider any future Ramona convent zoning or land use applications on their merits. *The order does not even mention the free exercise claim or the intervening enactment of the Religious Freedom Restoration Act, even though these were the focus of Ramona Convent's opposition to the petition.* Further, the conclusion that the court's upholding the earlier zone change application has a res judicata and collateral estoppel effect (App. H2) on subsequent applications is repugnant to this Court's holding in *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 352-53 and n.8, 9 (1986).

REASONS WHY THE WRIT SHOULD ISSUE

A. The Decisions Of The California Courts Were Repugnant To Federal Law In Terms Of Both Results And The Procedures Through Which Those Results Were Reached

The rulings below are wrong substantively. *First*, they fail to recognize that the acts of the City interfere with Ramona Convent's right to free exercise of religion under the First Amendment to the Constitution and under the Religious Freedom Restoration Act. *Second*, they unblushingly dedicate private land for an admittedly public use in clear violation of the just compensation clause.

The errors below reach beyond the substantive violation into procedural due process. The violation of free exercise of religion claim was plainly raised in Ramona Convent's complaint, and was rejected *without consideration at any level* — administrative, trial court, Court of Appeal or California Supreme Court.

B. The California State Court Rulings Deprived Ramona Convent Of Its Right To Free Exercise Of Religion And The Protections Secured By The Religious Freedom Restoration Act, While Never Considering The Substance Of The Claims On The Point Ramona Convent Raised

1. How The California Courts Disposed Of Ramona Convent's Free Exercise Claims Without Deciding Them

Ramona Convent raised its claim that the City's de facto appropriation of the Property violated its free exercise rights in the Fourth Cause of Action in the complaint.[7] (CT 11-12) The City's motion for summary adjudication (CT 291-330) did not even allude to the free exercise claim.

Courts have recognized that because of its favored status, a party claiming deprivation of the right of free exercise of religion is entitled to a plenary hearing on that claim. A leading case in point, with persuasive explication, is *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855 (2d Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989). *Yonkers* held:

> The protections afforded by the first amendment require at the very least that the Seminary have a full and fair opportunity to have its rights considered in an attempt — consistent with the 'great respect' courts accord religious groups — to avoid a direct confrontation between church and state. (*Id.* at 872)

See also The Order of Friars Minor v. Denver Urban Renewal Authority, 527 P. 2d 804 (Colo. 1974) (held: without plenary hearing and evidence, court was not empowered to decide whether taking of church parking lot would impair

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[7] While much of the focus below was on the 1.97 acre Property because of Ramona Convent's immediate need to sell the Property, and on the attempted development of senior housing, the City's regulatory acts impacted the entire 19.17 acre School Site by rendering is continued operation economically unviable, absent the sisters' ability to raise funds for repairing the earthquake damage by selling or otherwise productively using the 1.97 acres.

religious mission); and *Pillar Of Fire Church v. Denver Urban Renewal Authority*, 509 P.2d 1250, 1254 (Colo. 1973) (plenary hearing required to balance congregation's religious commitment to the site of its church with community redevelopment goals).

Ramona Convent received no hearing at all on its free exercise claim, let alone a plenary hearing.

As noted above, the **entire** consideration of the Fourth Cause of Action in the order granting summary adjudication and in the subsequent judgment addressed the immunity of the individual defendants; no mention whatever was made of the free exercise claim against the City. Thus, the Court of Appeal affirmed a nonruling.[8] The Court of Appeal's entire consideration of the issue consists of three conclusory paragraphs, unencumbered by any citation to authority, the last of which reads:

> Further, the City has not interfered with Ramona's free exercise of religion. Ramona's precarious financial situation stems *in part* from a natural disaster and not from any action of the City. The City has no First Amendment obligation to rezone a portion of Ramona's property to ensure Ramona's solvency. (App. B16; 21 Cal.App.4th at 24-25, emphasis added)[9]

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[8] Before the Court of Appeal, the City slightly upgraded its product in responding to the free exercise claim: it mentioned a couple of lower court decisions cited by Ramona Convent. But, having survived nicely on minimalist response both before the City council and the trial court, the City apparently felt no need to address the basic arguments Ramona Convent raised or deal with the controlling cases of this Court on which Ramona Convent relied.

[9] The perfunctory tone, as well as the content, of the language quoted is disturbing. The second sentence, stating that "Ramona's precarious financial situation stems in part from a natural disaster

(continued)

The June 6, 1994, order made no mention whatever of the free exercise claim even though it occupied center stage in the written argument on the petition.

That's it. That's all there is. Ramona Convent was left with a ruling that its free exercise rights had not been violated, which has its genesis in a motion for summary adjudication that did not even mention the issue, a trial court judgment that did not mention the claim and a terse, non-analytical court of appeal affirmance. Neither the City or either court below spoke to the actual claims raised *or addressed any of this Court's controlling decisional law.*

This case thus stands as a strong witness to the truth this Court noted almost four decades ago:

> The procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied.

Speiser v. Randall, 357 U.S. 513, 520 (1958).

How did this astonishing scenario come to be? There is every indication that it was no accident, and that California courts — once again fervently deferring to governmental entities in land use regulation cases (*see post*) — simply pushed the free exercise claim to the periphery, inexplicably

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(fn. continued)
[the Whittier earthquake] and not from any action by the City" recognizes (while at the same time seeming oblivious to) the implication that the situation arises "in part" from the City's act. Ramona Convent, were its hands not tied by the stultifying regulation, could deal with the earthquake: it is the regulations that pose the hurdle. Similarly, the last quoted sentence is totally misleading, suggesting that Ramona Convent initiated action to upgrade its zoning, when the City rezoning initiative changed the zoning from a classification that left Ramona Convent appropriate options to one that divested it of the power to act to control its future. The City, not acts of God or forces of nature or internal decisions, has placed the convent school at risk.

treating it as somehow subsumed in the Fifth Amendment claim.

2. The City's Regulatory Acts Substantially And Unnecessarily Burden Ramona Convent's Right Of Free Exercise Of Religion

The First Amendment guarantee that Congress shall make no law prohibiting the free exercise of religion binds the states under the doctrine of selective incorporation through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

Templates of this Court's construction of that guarantee are that:

(1) "*indirect* coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment" (*Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988));

(2) little, if any, presumption of validity attaches to zoning ordinances that tread on First Amendment rights (*Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 (1982); *Schad v. Mt. Ephraim*, 452 U.S. 61, 77 (1981) (Blackmun, J., concurring)); *see also Yonkers*, 858 F.2d at 871-72; *Islamic Center of Miss., Inc. v. City of Starkville, Miss.*, 840 F.2d 293, 300 (5th Cir. 1988); and

(3) if accommodation between the interests of Church and state is possible, it should be pursued no matter how compelling the state interests might be (*Lyng* at 454-55).[10]

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[10] In stark contrast with *Lyng*, the courts below refused even to consider the point, concluding that the land use regulatory scheme

(continued)

Further, when the government imposes an infringing zoning ordinance, it — not the religious body — bears the burden of justifying necessity. *Islamic Center*, 840 F.2d at 300. This point has just been vigorously reinforced by *Dolan v. City of Tigard*, __ U.S. __ (1994 WL 276693).

The principle that indirect, as well as direct, encroachments on religious freedom are prohibited was recently reinforced by the passage of the Religious Freedom Restoration Act of 1993 (42 U.S.C. §§ 2000bb *et seq.*). After recognizing the special protection accorded free exercise, the Congress noted, in language of significance here, that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise" (§ 2000bb), and that "[g]overnment may substantially burden . . . exercise of religion *only if it demonstrates* that application of the burden . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest." (§ 2000bb-1; emphasis added) Thus, the burden-of-proof standard imposed by *Dolan, supra*, as belonging to the regulating government entity, applies *by statute* across the board to all regulations that impact on religious freedom — whether they do so directly or indirectly.

Further, and significantly, the government always carries the "burdens of going forward with the evidence and of persuasion." (§ 2000bb-2) The City obviously assumed no such burdens here.[11]

(fn. continued)
was the end-all, and that it was unnecessary to consider its impact on Ramona Convent's religious mission, much less accommodate it.

[11] The Religious Freedom Restoration Act, by its terms, restores the compelling interest test framed in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and overrides anything to the contrary in *Employment Division v. Smith*, 494 U.S. 872 (1990). The City rezoning and lot split denial predate *Smith*; there is accordingly no question that the Act controls this case.

This Court has thus far not construed the Religious Freedom Restoration Act. This case implicates many of its provisions, and implicates them profoundly. Certiorari should be granted to enable this Court to speak to the act in a particularly compelling factual context.

The particular religious interest protected here is "the dissemination of religious ideas . . . the right of parents . . . to direct the education of their children . . . [and] the communication of religious beliefs." *Employment Div., Dept of Human Resources v. Smith*, 494 U.S. 872, 881-82 (1990).

Ironically, one of this Court's opinions — indeed the leading case addressing the right of a religious order to conduct a parochial school on an economically sound basis — involved ***this identical religious order***. The State of Oregon enacted legislation requiring (with extremely limited exceptions) children between the ages of 8 and 16 to attend public schools. The Society of the Holy Names of Jesus and Mary (joined by another private school) challenged the ordinance on the ground that it constituted the taking of property without due process or just compensation. Held: "[W]ithout doubt enforcement of the statute would seriously impair, perhaps destroy, the profitable features of appellees' business and greatly diminish the value of their property." *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 531 (1925). This Court noted the mission of the order in language still applicable today (and particularly apropos in view of the special place the Ramona Convent school occupies in the history of the City of Alhambra):

> [The Society of Sisters] has long devoted its property and effort to the secular and religious education and care of children, and has acquired the valuable good will of many parents and guardians. (*Id.* at 532)

This Court further recognized that "the inevitable practical result of enforcing the act under consideration would be destruction of appellees' primary schools . . . in this state." (*Id.* at 533-36; *see also American Booksellers Ass'n v. Webb*, 590 F. Supp. 677, 689 (N.D. Ga. 1984) (citing *Pierce*).)

The manner in which this case should have been handled below was recently illustrated by a federal district court. Exercising its zoning power — like the City here — the District of Columbia forbade a church from further conducting its program to feed the homeless. Grounding its analysis in substantial part in the Religious Freedom Restoration Act, the Court enjoined the City from enforcing it because it would "substantially burden plaintiff's right to the free exercise of religion." *Western Presbyterian Church, et al. v. The Board of Zoning Adjustment Of The District Of Columbia*, __ F. Supp. __ (D.D.C. 1994) (No. CIV A 94-0749; 1994 WL 145033). The Court was impressed that the Church had conducted its religious-based activity for "over 10 years"; Ramona Convent has conducted its educational mission at the School Site for 105 years.[12]

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[12] Ever helpful, the City suggested below (RB 18) that the Ramona Convent sisters make up the shortfall by: (1) increasing tuition (not possible on the record because of the demographics of the student body); (2) increasing the number of students (not possible without spending money to increase the size of the present plant; further, since the school is suffering a per-student deficit, such an increase would only increase the total deficit); (3) acquiring massive charitable bequests (no particulars of how this might be accomplished were suggested) and (4) spending less time teaching and more time conducting carnivals and Bingo games. This, of course, was done by argument of counsel; not an iota of evidence was adduced that any of these activities were feasible. In a breathtaking display of hostility to the sisters' religion, at oral argument, the presiding justice of the Court of Appeal offered this suggestion: "Let them go see the bishop and get money from him." But the convent school of course has no claim on diocesan church funds.

No opinion below, and certainly nothing filed by the City, speaks to this body of law. The free exercise claim has been evaded and avoided at every stage of this case. Its merits remain unaddressed. Ramona Convent deserves better. The Constitution offers Ramona Convent better.

C. In Direct Conflict With Controlling Statutory And Case Law, The Court of Appeal Affirmed A Summary Adjudication Which Was Completely Devoid Of Evidentiary Support And Grounded In An Incorrect Legal Standard

1. The City Presented No Evidence Whatever On The Issue Of Economically Beneficial Or Productive Use

The Opinion correctly noted that the "purpose of the summary judgment procedure" is to discover the existence of issues "through the medium of affidavits." (App. B8; 21 Cal.App.4th at 19) Indeed, "it is fundamental [California law] that the party moving for summary judgment has the burden of showing by declarations or affidavits setting forth facts admissible as evidence in a trial that the claims or defenses of the adverse party are entirely without merit . . ." *Murphy v. Allstate Ins. Co.*, 83 Cal.App.3d 38, 41 (1978); *see also* Cal. Code Civ. Proc. § 437c(b). But apart from this threshold lip service, no more attention was paid to these principles than to the burdens imposed by the free exercise clause. As noted *ante*, the City offered **no** affidavits, **no** declarations, **no** admissions, **no** interrogatory answers, **no** deposition excerpts, **no** requests for judicial notice to support its motion. The only relevant evidence going to the merits was presented by Ramona Convent, and it showed the ostensibly permitted uses to be physically impossible,

economically infeasible or unsuitable for an order of teaching nuns.

The motion not only lacked supporting evidence, it posited the wrong legal standard. In its "Statement of Undisputed Material Facts," the City stated: "The Alhambra Open Space Zoning Ordinance does not deprive plaintiff of all use of the subject property." (CT 465) But deprivation of *all* use is not the legal standard. Under this Court's most recent formulation, the challenged regulation must leave the owner at least some "economically beneficial or productive use." *Lucas v. South Carolina Coastal Council*, 505 U.S. __, 112 S.Ct. 2886, 2901. While resolution of these cases is determined by "essentially ad hoc, factual inquiries," depending largely "upon the particular circumstances" (*Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)), "the inquiry is not standardless. The economic impact of the regulation . . . is of particular significance." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). The City's apparent position is that a mere recital of the zone uses was sufficient, and no further inquiry was required.

The City's refusal to grant a lot split effectively forecloses Ramona Convent's ability to sell any part of the school parcel to insure the school's continued existence, frustrating the constitutional right to convey property. *Hodel v. Irving*, 481 U.S. 704, 716 (1987). Is this the "least restrictive means" available to the City in pursuit of whatever "compelling governmental interest" the public facility classification is supposed to embody? Is this even a perfunctory effort at accommodation of conflicting interests of church and state?

2. The Opinion Ignores Controlling Policy

An examination of the policy which underlies the just compensation clause gives further insight into the correct standard. The clause is intended "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). *See also United States v. Willow River Power Co.*, 324 U.S. 499, 764 (1945); and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) ("We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.")

This court has this term stressed once more that the just compensation clause requires a fair distribution of the costs of public improvements. *Dolan v. City of Tigard*, 1994 WL 276693, *10-11.

Justice Stewart's oft-quoted statement about the relationship between liberty and rights in property has special relevance:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation . . . is in truth, a "personal" right . . . In fact a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972).

Very recently, in *United States v. James Daniel Good Real Property*, 114 S.Ct. 492, 505 (1993), this Court reaffirmed what it said in *Lynch*, identifying as "an essential principle" the fact that "[i]ndividual freedom finds tangible expression in property rights."

This Court has consistently recognized that the right to use one's property reasonably is an essential right. "The right of the trustee to devote its land to any legitimate use is property within the protection of the Constitution." *Washington ex. rel. Seattle Trust Title Co. v. Roberge*, 278 U.S. 116, 121 (1928). "[T]he right to build on one's own property — even though its exercise can be subjected to legitimate permitting requirements — cannot remotely be described as a 'government benefit.' " *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987).

The Court of Appeal opinion makes no mention of these standards which should have guided its resolution. Its underlying assumption is that if the ordinance threatens Ramona Convent's religious mission, or even its survival, that's just too bad.

D. The Opinion's Actual If Unspoken Holding, That Private Property May Be Conscripted For A Public Use Without Compensation, Is Unprecedented And Contradicts Controlling Constitutional Language And Case Law

Because it focuses on the "open space" label rather than the *conceded* public facility reality, the Court of Appeal opinion has a surrealistic quality. Real "open space" is a worthwhile public amenity, but one that almost by definition affords the owner of property so classified no economically beneficial or productive use, particularly in urban areas. Stultifying regulation, which unjustly randomizes the cost, is not the way to attain that goal; acquisition, which fairly

spreads the cost, is. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). And this is true *a fortiori* where, as here, an "open space" label masks a quite different use: a conceded public use appropriation.[13]

The Court of Appeal opinion's actual (if disguised) holding is revolutionary. The Fifth Amendment is explicit that private property shall not be taken for public use without just compensation. Similarly, the California Constitution (art. 1 section 19) provides: "Private property may be taken or damaged for public use only when just compensation . . . has first been paid to . . . the owner." It is difficult to imagine a more flagrant flouting of this standard than designating private property for an admittedly public use (*i.e.*, public utility use, police stations, flood control channels and the like). The Court of Appeal to the contrary (App. B16; 21 Cal.App.4th 24), "land grab" is an apt description of what happened here. As Professor Laurence Tribe aptly put it, "forcing someone to stop doing things with his property — telling him you can keep it, but you can't use it — is indistinguishable, in ordinary terms, from grabbing it and handing it over to someone else." Tribe, *American Constitutional Law* at 460 (1978). This Court made the same point in *Lucas* when it noted that "regulations that leave the owner of land without economically beneficial or productive options for its use . . . carry with them a heightened risk that private property is being pressed into some form of public service. . . ." 112 S.Ct. at 2894, 2895.

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[13] On its face, the ukase that a single parcel located in the heart of the Los Angeles metropolitan area is henceforth "open space" should arouse suspicion in a reasonable mind. And when that is coupled with a concession that the "open space" label masks a use that is by definition public, the constitutional infraction is apparent.

E. The Classification Of Ramona Convent's Property For A Public Facilities Use Denies Ramona Convent Equal Protection Of The Laws

The City has imposed on a few private schools (and initially imposed on the Ramona school site alone) the ***entire private burden*** of the City's open space/public facility zone. No other private institution, and no private citizen, is asked to contribute so much as a dime or a square inch of property. The City and court acts here reviewed threaten an economic death sentence for Alhambra's most historic institution.

And it could only have happened in California.

F. California Land Use Regulation Law, The Most Draconian In The United States, Needs To Be Returned To The Mainstream By This Court

Professor Dennis J. Coyle, in preparing his recent book *Property Rights and the Constitution*, State University of New York Press (1993), asked eight leading scholars (identified at *id.* 277 n.23) to identify the states most and least protective of landowner rights. There was a divergence of response to the first inquiry, but not the second: "California was a near unanimous choice as the state least likely to protect landowner rights. California municipalities . . . are accustomed to meeting little resistance from the state courts." *Id.* at 11. In an extended chapter entitled "California: Where Deference Reigns Supreme," Coyle identifies the message of California courts to regulators as "Do what you want." *Id.* at 156.

This is nothing new. For over a quarter century, legal scholars — even those oriented toward strict land use controls — have looked in wonder at California's do-your-own-thing response to constitutional directives. Particularly

pungent are the comments of the acknowledged dean of American zoning law, the late Richard F. Babcock, a leading advocate of far-reaching regulations, from *The Zoning Game Revisited*, Lincoln Institute of Land Policy (1985) (written with Charles L. Siemon):

> [A]nyone who practices public law in California should know better than to expect the California courts to be sympathetic with procedural due process protests when they challenge governmental practices. The Fourteenth Amendment appears to be nonexistent. (*Id.* at 251)
>
> * * * * *
>
> In California, the courts have elevated governmental arrogance to a fine art. (*Id.* at 253)

Professor David L. Callies, a co-author of *The Taking Issue* (1972), and a prominent land regulation advocate, has taunted, "We know that the California courts won't let the landowners/developers build anything!" Callies, *Land Use Controls: An Eclectic Summary for 1980-1981*, 13 The Urban Lawyer 724, n.6 (1981)

From an authoritative text by a former land use control officer and leading scholar strongly identified with the government's view in land use cases:

> In a fairly long series of cases, the California court has upheld restrictions on property rights which would not be upheld in many other states, and (in some instances) probably not in any other state. Williams, *American Planning Law* §6.03 pp. 115-16 (1974).[14]

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[14] These quotes are a sampling from a much longer list. *See, e.g.*, Kudo, *Nukolii: Private Rights and the Public Interest*, 16 The Urban

(continued)

Even discounting for literary flourish, these quotes pre sent a disturbing message: the constitution is not receivin the enforcement in California it receives in sister states. I California constitutional rights exist on paper, but are simpl not enforced.[15]

In 1987, this Court pointedly told California *twice* that i had fallen into error in constricting citizens' rights i property. The corrective 1987 cases are *First English Evan gelical Lutheran Church v. County of Los Angeles*, 482 U.S 304 (1987), which spoke to remedies ("the California court have decided the compensation question inconsistently wit the requirements of the Fifth Amendment"; *id.* at 311) an *Nollan*, 483 U.S. 825, 839 (1987), which addressed dedica tion ("Our conclusion on this point is consistent with th approach taken by every other court that has considered th question, with the exception of the California state courts.") Only last month, this Court spoke again by vacating a California Court of Appeal decision in *Ehrlich v. Culve City*, __ U.S. __ (1994 WL 495368) in which — as in th case at bench — California courts summarily brushed aside a landowner's First Amendment contentions without bothering to cite any authority whatever (*see Ehrlich*, 15 Cal.App.4t 1737, 1758 (1993)).

(fn. continued)
Lawyer 279 (1984); Callies, *The Taking Issue Revisited*, 37 Land Use Law & Zoning Digest 6, 7 (July 1985); Hagman, *Exactions, User Fees and Assessments: What Are the Limits?*, Zoning and Planning Law Handbook 45, 73-74 (1983); and Callies, *Land Use Controls: An Eclectic Summary for 1980-1981*, 13 The Urban Lawyer 724 n.6 (1981); and Berger, *You Can't Win Them All — O Can You?*, 54 Cal. State Bar Journal 16 (1979).

[15] This criticism of California practice should not be seen as extending beyond this one corner of the law. In many other substantive areas, including direct condemnation, California courts have consistently been firmly in the mainstream.

But these corrective cases do not seem to correct. The number of post-1987 reported California decisions in which damages have been awarded for excessive land use regulation has now reached the grand total of zero. And the number of cases in which the California Supreme Court has spoken to the issues raised in *First English* and *Nollan* since those opinions were issued has also reached the grand total of zero. *See* Berger, *Silence at the Court*, 26 Loy. L.A. L. Rev. 1133 (1993).

Chillingly harsh opinions continue to appear, as if *First Lutheran* and *Nollan* had never happened. The same Court of Appeal panel that issued the opinion in this case decided *Patrick Media Group, Inc. v. California Coastal Comm'n*, 9 Cal.App.4th 592, 616 (1992), negating just compensation concededly due because the owner failed to seek mandamus before requesting compensation even though the regulating entity "acted in violation of statutory and regulatory requirements," and had not given notice of "relevant administrative hearings," and standing this Court's opinion in *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990), on its head in the process by insisting that invalidation — not damages — is the remedy of first instance. *See also*, among many others that could be listed, *Long Beach Equities v. County of Ventura*, 231 Cal.App.3d 1016 (1991), cited by the Court of Appeal at App. B14, 21 Cal.App.4th 23; *City and County of San Francisco v. Golden Gate Heights Investments*, 14 Cal.App.4th 1203 (1993) (City allowed to in effect confiscate 5 lots without compensation because it might have — but in fact did not — earlier regulate them into disutility). And now the opinion at bench.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. __, 112 S.Ct. at 2901, this Court reiterated (quoting *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164 (1980)) that "a 'State, by ipse dixit, may not transform private property into public property without compensation . . .' " But it happened here.

CONCLUSION

Some land use regulation decisions of local government simply do not deserve deference. The City of Alhambra's so-called open space ordinance is one of them.

Ramona Convent is aware that this Court receives a steady stream of petitions from California land use decisions. But this case is more than just another California horror story-of-the-month. It implicates significant issues in other areas of Federal constitutional law, notably free exercise of religion. And the land use issues it presents are compelling and recurring. The decision below cannot be reconciled with the law of this Court, or with a substantial body of case literature from virtually all other jurisdictions. California has been a state apart long enough. The petitioner is deserving, seeking merely to survive and serve.

All that Ramona Convent desires is to carry on its century-old religious mission of providing a quality Catholic education to young women. To do so, Ramona Convent must somehow raise the funds to pay for the earthquake repair, and the *only* practical way that can be done, is by selling the 1.97-acre parcel, its only saleable asset. That cannot have a significant effect on the City's land-use planning scheme, but its denial by the City endangers Ramona Convents' continued existence and thus its right to engage in its constitutionally protected religious mission. Even a minimal respect for Ramona Convent's constitutional rights militates in favor of such a modest accommodation.

Ramona Convent respectfully prays that certiorari be granted.

DATED: July 11, 1994.

Respectfully submitted,

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Attorneys for Petitioner
Ramona Convent of the
Holy Names of Jesus and Mary

APPENDIX A

SECOND APPELLATE DISTRICT
DIVISION THREE, No. B064755
S037719

SUPREME COURT
FILED
APR 13 1994
Robert Wandruff Clerk
_____ Deputy

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

RAMONA CONVENT OF THE HOLY NAMES,
Appellant

v.

CITY OF ALHAMBRA,
Respondent

Appellant's petition for review DENIED.

LUCAS
Chief Justice

APPENDIX B

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

Court of Appeal Second Dist.
FILED
DEC 20 1993
Joseph A. Lane, Clerk
_____ Deputy Clerk

RAMONA CONVENT OF THE HOLY NAMES,
Plaintiff and Appellant,
v.
CITY OF ALHAMBRA,
Defendant and Respondent.

2d Civil No. B064755

(Super. Ct. No. C755518)

APPEAL from a judgment of the Superior Court of Los Angeles County. Herbert M. Klein, Temporary Judge.* Affirmed.

Sullivan, Workman & Dee, Roger M. Sullivan and Henry K. Workman; Crosby, Heafey, Roach & May, Gideon Kanner, M. Reed Hunter and Susan A. Beytin, for Plaintiff and Appellant.

Leland C. Dolley, Alhambra City Attorney; Burke, Williams & Sorensen and Robert V. Wadden, Jr., for Defendant and Respondent.

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* Pursuant to California Constitution, article VI, section 21.

Plaintiff and appellant Ramona Convent of the Holy Names (Ramona) appeals a judgment in favor of defendant and respondent City of Alhambra (the City) following the grant of a motion for summary adjudication which disposed of all issues between the parties.

Ramona desires to sell 1.97 acres of its campus to generate funds for school purposes. The essential issue presented is whether the City's general plan and conforming open space zoning have resulted in a taking of that portion of Ramona's property.

While the zoning of the parcel denies Ramona the highest and best use of the property, it does not amount to a taking. Thus, the trial court properly rejected Ramona's inverse condemnation claim. The judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Ramona has operated a Catholic girl's school in Alhambra since 1889. The school is located on a parcel of land measuring about 19.17 acres owned by Ramona. In 1986, to remedy a deficiency in the amount of open space in Alhambra, the City's zoning and general plan designation for the subject property, and for school properties generally, were changed from "Multiple Family" (R-3) to "Open Space." Thus, Ramona's entire property now is zoned as open space and is designated as open space under the land use element of the City's general plan.

In the 1987 Whittier earthquake the school's main building sustained extensive damage. To pay for this

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[1] This summary is based in part on this court's prior opinion in this matter filed September 4, 1992. (No. B054958.)

major expense Ramona decided to sell 1.97 acres at the northwest corner of the campus, which area had been used as a softball diamond.

Wonder Enterprises, Inc. (Wonder), a private developer, obtained an option to purchase the 1.97-acre site, on which it intended to construct 88 senior citizen residential units.

In May 1989, Ramona filed an application for a tentative tract map which would provide for a lot split to divide the property into a 17.2-acre parcel and a 1.97-acre parcel.

The City's planner notified Ramona's engineer the application was incomplete because it lacked a development proposal. They agreed the application would be combined with the senior citizen housing proposal on the 1.97-acre site.

Wonder sought City sponsorship for the project which would have allowed it to build 88 units under a density bonus incentive. The City Council voted not to sponsor the proposed project. Absent such sponsorship, the maximum density would be 59 units. Wonder withdrew its application for the 88-unit project.

Ramona's engineer informed the City that Ramona still wanted to proceed with the processing of its lot split application despite the fact it was unaccompanied by a proposed development project.

At a November 6, 1989 hearing, the planning commission rejected Ramona's argument the application was "deemed approved" by the City's failure to act within the statutory time limits. The commission then denied Ramona's application.

Ramona appealed that determination to the City Council. On January 8, 1990, the City Council denied Ramona's application on the grounds it would not

promote the City's goal of open space and was inconsistent with the City's general plan.

On March 23, 1990, Ramona commenced this action by filing a petition for writ of mandate pursuant to Code of Civil Procedure sections 1085 and 1094.5, combined with damages claims for inverse condemnation and violation of civil rights.

On September 26, 1990, following a hearing, the trial court denied Ramona's petition for a writ of mandate. Based on the City's declarations, the trial court found the parties had agreed to extend the time for acting on Ramona's application, and thus, the application was not "deemed approved" for the City's failure to act timely pursuant to Government Code section 66452.4. The trial court also found no abuse of discretion in the denial of Ramona's application.

Ramona appealed, contending there was no substantial evidence to support the City's determination the lot split would be inconsistent with the general plan, and that it had been denied a fair trial before the City Council and the trial court.

On September 4, 1992, this court affirmed the judgment denying the petition for writ of mandate.[2] We held the City was entitled to deny approval of the lot split application if the design of the proposed subdivision were inconsistent with the applicable general and specific plans. Because the resultant 1.97-acre parcel would have been too small to be conducive to any of the uses permitted for open space, there was no abuse of discretion in the denial of Ramona's application. As for Ramona's other contention, Ramona had conceded its denial of due process claim "may be somewhat academic

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[2] Ramona did not seek further review by way of a petition for rehearing or for review and the decision became final.

because the 'deemed approved' statute could not rescue a lot split which was inconsistent with the general plan." Because the proposed lot split in fact conflicted with the general plan, the denial of Ramona's due process claim was moot.

As for the remaining third and fourth causes of action, inverse condemnation and violation of civil rights, on June 10, 1991, the City filed a motion in the trial court for summary adjudication. It contended, inter alia, the inverse condemnation claim was not ripe, the open space zoning ordinance did not effect a taking as it did not deny Ramona all use of its property,[3] and if the inverse

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[3] Chapter 23.34 of the Alhambra Municipal Code, pertaining to open space or OS zones, states in relevant part: "23.34.010 **Purpose**. [¶] In order to establish and provide outdoor recreation and open space resources, and to prevent inappropriate development of areas which should be regulated to provide for scenic, recreational, historic, conservation, aesthetic or public health and safety uses, the regulations set out in this chapter shall be applicable to all lots classified in the OS zone. [Citation.] [¶] 23.34.020 **Permitted uses**. [¶] No person shall use, nor shall any person permit the use of, any property classified in the OS zone, for any use other than the following: [¶] 1. Public recreational uses such as parks, playgrounds and recreation areas, excepting buildings and structures thereon; [¶] 2. Golf courses and country clubs, excepting buildings and structures thereon; [¶] 3. Flood-control channels; [¶] 4. Public utility rights-of-way; [¶] 5. Creeks, rivers, spreading grounds and other similar water courses. [Citation.] [¶] 23.34.030 **Conditionally permitted uses**. [¶] The following uses may be permitted subject to the approval of a conditional use permit pursuant to the provisions of Chapter 23.66 of this title: [¶] 1. **Educational institutions**; [¶] 2. Buildings and structures accessory to and located within the areas set forth in Section 23.34.020 above; [¶] 3. Agricultural and horticultural cultivation; [¶] 4. Water wells, reservoirs, tanks, dams, treatment plants, gauging stations, pumping stations and any use normal and appurtenant to the obtainment, storage and distribution of water; [¶] 5. Utility substations and distribution stations; [¶] 6. Burial parks, cemeteries, columbariums and mausoleums; [¶] 7. Commercial antennae; [¶] 8. Fire and police stations; [¶] 9. Stables

(continued)

condemnation claim were improper the civil rights claim must fail as well.

Ramona opposed the motion, arguing, inter alia, the City had failed to cite any evidence to support its assertion the Alhambra open space zoning ordinance did not deprive Ramona of all use of the property.

Ramona submitted a supporting declaration by its financial officer, Sister Marion Patrick. She stated: The 1.97-acre site was vacant and was being used as a baseball field, a use not essential to the school's purpose and which would be accommodated elsewhere. Ramona had been operating for years at a financial deficit and the sale of the 1.97-acre parcel for residential development was the only source of funding to repay the loan required to rebuild the earthquake-damaged structure. If the loan were not repaid, the existence of Ramona, a Roman Catholic educational institution that had provided academic and religious training to young women for a century, would be jeopardized.

Ramona's opposition papers also included a supporting declaration from a real estate appraiser, James J. Reid, who stated: Most of the uses which were permitted or conditionally permitted within the open space zone, e.g. public parks, flood-control channels and utility substations, were public or quasi-public in nature and of no practical use or value to a private property owner such as Ramona. As for the nonpublic uses which were permitted or conditionally permitted, e.g. agricultural cultivation, burial parks, stables and riding academies, none of those uses was appropriate for the 1.97-acre parcel because of the size, location and/or topography of the site. He was advised Ramona did not

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(fn. continued)
and riding academies; [¶] 10. Libraries and museums; [¶] 11. Outdoor nursery storage. [Citation.]" (Italics added.)

require the 1.97-acre parcel for its educational institution. As a result, from a planning perspective, the open space zone provided Ramona with no practical or economic use of said parcel.

The motion for summary adjudication of issues was heard on September 19, 1991, and was taken under submission. On December 13, 1991, the trial court entered an order granting summary adjudication as to the third and fourth causes of action. It found the inverse condemnation claim was not ripe because Ramona had not pursued all available remedies to develop the use of the property commensurate with the existing permissible uses and further had failed to show that all of the property's beneficial uses were destroyed or prevented by the City's actions. It also found the civil rights claim against the individual defendants, members of the City Council and the city clerk, was barred on the grounds of immunity.

Ramona appealed.[4]

CONTENTIONS

In sum, Ramona argues the City's general plan and conforming zoning have impacted its property so as to work a taking or damaging for which compensation is due, and the City has otherwise violated its constitutional and civil rights.

Ramona makes the following contentions: (1) summary adjudication was erroneously granted because the City failed to establish there were no disputed issues of material fact; (2) Ramona's property has been taken without just compensation; (3) Ramona's taking claim is

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[4] We construe the February 10, 1992 notice of appeal to refer to the judgment filed April 14, 1992. (Cal. Rules of Court, rule 2(c).)

ripe for adjudication; (4) the City's actions unconstitutionally impinge upon Ramona's right to free exercise of religion; (5) the City violated Ramona's civil rights by denying it due process, equal protection, just compensation and free exercise of religion; and (6) the trial court erred in finding the individual defendants immune from the consequences of their unconstitutional conduct.

DISCUSSION

1. Standard of appellate review.

The purpose of the summary judgment procedure is not to try the issues but merely to discover, through the medium of affidavits, whether there are issues to be tried and whether the parties possess evidence which demands the analysis of trial. (*Saporta v. Barbagelata* (1963) 220 Cal.App.2d 463, 468; *Orser* v. *George* (1967) 252 Cal.App.2d 660, 669.)

A defendant moving for summary judgment has the burden of establishing a complete defense or negating each of the plaintiff's theories and establishing the action is without merit. (*Tresemer v. Barke* (1978) 86 Cal.App.3d 656, 666; *Bonus-Built, Inc. v. United Grocers, Ltd.* (1982) 136 Cal.App.3d 429, 442.)

After examining the facts before the trial court on a summary judgment motion, we independently determine their effect as a matter of law. (*California Aviation, Inc. v. Leeds* (1991) 233 Cal.App.3d 724, 730-731.) The trial court's stated reasons for its ruling do not bind us; we review the ruling, not its rationale. (*Id.*, at p. 731.)

In that review, we uphold the trial court's ruling in this matter.

2. The case is ripe for adjudication.

The City contends Ramona's case is not ripe for adjudication because the application for senior citizen housing was withdrawn and at the time the lawsuit was filed, Ramona had not officially proposed any use for the property.

We agree with Ramona's position in this regard. It appears the case is ripe for adjudication because the City has identified definitively the uses it will permit for the property.

In its answer, the City pled it had designated and zoned Ramona's property as open space and had denied a parcel map application "in furtherance of the public goal of preserving open space consistent with the City's general plan."

Further, at a hearing on the tentative parcel map application, the city manager explained that to remedy the deficiency in the amount of open space in Alhambra, all schools which had been zoned multiple family were rezoned to open space and "it would be inconsistent with the General Plan to permit any other type of use *now or in the future*[.]" (Italics added.)

In view of the above, the City has reserved the subject property for specific open space uses. Accordingly, the matter is ripe.

3. There has been no taking of the undivided 19.17-acre parcel.

This court's previous decision in this matter which is now final established the City properly denied Ramona's lot split application. Accordingly, there is no discrete 1.97-acre parcel at the northwest corner of the campus. The 1.97-acre area is part of the 19.17-acre parcel and

the 1.97-acre area is zoned the same as the rest of the property. The City has not treated the 1.97 acres any differently than the rest of the property.

Thus, there exists only a single undivided 19.17-acre parcel. The 19.17-acre parcel has not been taken by the City. The undivided parcel, including the baseball diamond, continues to be used for school purposes, consistent with the open space classification.

4. There has been no taking of the 1.97-acre portion of the parcel.

Even if the 1.97-acre portion of the parcel were viewed as a discrete area, this case does not present a situation of a zoning regulation which denies the owner any reasonable use of the land in question.

a. No merit to Ramona's contention the City has taken 1.97 acres of the parcel by freezing it into idleness.

Ramona contends the City has taken the 1.97-acre portion of the parcel by freezing it into idleness, and the City cannot defend on the theory it has permitted development in the rest of the larger parcel. The argument fails because there is only a single 19.17-acre parcel, *all* of which may be used by Ramona for, inter alia, school purposes.

The cases cited by Ramona in support of its argument are inapposite.

Twain Harte Associates, Ltd. v. County of Tuolumne (1990) 217 Cal.App.3d 71, involved an 8.5-acre parcel zoned " 'light commercial.' " A shopping center complex and parking lot occupied only about 6.8 acres thereof. The remaining 1.7 acres of the parcel remained

undeveloped. The County rezoned the 1.7-acre undeveloped plot from " 'light commercial' " to " 'open space' " to ensure land use compatibility between residential and commercial land uses. (*Id.*, at pp. 77-79.)

The owners contended the downzoning of the 1.7-acre plot constituted economic deprivation so onerous as to constitute a taking of the portion of the property. (*Twain Harte Associates, Ltd., supra*, 217 Cal.App.3d at pp. 84-85.) The County argued the 1.7-acre plot must be considered within the 8.5 acre parcel for taking purposes, and the owners had suffered no substantive economic deprivation because the 8.5-acre parcel had upon it a shopping center of significant size and monetary benefit. (*Id.*, at p. 85.)

The *Twain* court rejected the County's argument, explaining "the law does not demand the entire 8.5-acre parcel be treated as a whole in an . . . inverse condemnation analysis. Rather, whether the ordinance 'went so far' in its economic consequences as to effect a 'taking' of the 1.7-acre undeveloped plot is an issue of fact. It entails assessment of the potential for development *of each of the differently zoned properties*, . . ." (*Twain Harte Associates, Ltd., supra*, 217 Cal.App.3d at p. 87, italics added.) Therein lies the difference with the instant case, wherein the zoning of the entire property is uniform.

Similarly, in *Aptos Seascape Corp. v. County of Santa Cruz* (1982) 138 Cal.App.3d 484, 490, a corporation sued the County for inverse condemnation, contending that in rezoning the plaintiff's property, the County deprived it of all reasonable use of certain of its land. The plaintiff owned 110 contiguous acres, 70 of which were "beachlands" and 40 acres of which were "benchlands." The effect of the rezoning was to disallow all development on the 70-acre beachlands portion of the 110-acre parcel. (*Id.*, at pp. 490-491.) The trial

court ruled, inter alia, the County had precluded all reasonable use of the beachlands and had taken the property to preserve it as open space and it entered a money judgment for the plaintiff. (*Id.*, at p. 491.)

One of the issues presented on appeal was whether the trial court had erred in considering the 70-acre property in isolation to determine whether there had been a taking, or instead, should have considered whether the zoning ordinance had deprived the owner of all reasonable use of the entire 110-acre parcel. (*Aptos Seascape Corp., supra*, 138 Cal.App.3d at p. 495.) The reviewing court observed "*when governmental action has divided contiguous property under single ownership into separate zones, and has restricted development in one of those zones*, a provision allowing some transfer of development rights from the restricted property or awarding compensating densities elsewhere may preclude a finding that an unconstitutional taking has occurred." (*Id.*, at p. 496, italics added.)

Thus, *Twain* and *Aptos* plainly are factually distinguishable. In each of those cases, the governing entity created *different* zones within a single parcel and restricted development in part of the property. Here, the zoning of the entire 19.17-acre parcel is *uniform*. The City has not zoned the 1.97-acre differently from the rest of the larger parcel. The entire parcel which is zoned open space may be used, inter alia, for school purposes.

It is Ramona, *not* the City, which seeks to treat the 1.97-acre portion differently from the rest of the parcel. Thus, there is no merit to Ramona's contention the City has taken the 1.97-acre portion of the larger parcel by limiting the development potential of the 1.97 acres.

b. Ramona has not been denied reasonable use of the property or any portion thereof.

Ramona also contends the 1.97-acre area has been taken because the City has compelled it to sacrifice all economically viable uses of the property. Ramona relies, inter alia, on the United States Supreme Court's recent decision in *Lucas v. So. Carolina Coastal Council* (1992) __ U.S. __ [120 L.Ed.2d 798, 814], wherein the Court stated "regulations that leave the owner of land without economically beneficial or productive options for its use — typically, . . . by requiring land to be left substantially in its natural state — carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." When an owner of real property "has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle," the owner has suffered a taking and is entitled to compensation. (*Id.*, at p. 815.)[5]

However, unlike a regulation which effects a taking by prohibiting all economically beneficial uses of the land in question (see *Lucas, supra*, 120 L.Ed.2d at pp. 814-815), the promulgation of a zoning law which results in only a diminution in the value of the affected property is not a taking. (*Euclid* v. *Ambler Co.* (1926) 272 U.S. 365, 396-397 [71 L.Ed. 303]; *HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 514-515, 518.)

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[5] In *Lucas*, the owner paid $975,000 for two residential lots on which he intended to build single-family homes. The South Carolina Legislature subsequently enacted the Beachfront Management Act which had the direct effect of barring the owner from erecting any permanent habitable structures on the two parcels. (*Lucas, supra*, 120 L.Ed.2d at p. 807.)

The denial of the highest and best use does not constitute an unconstitutional taking of property. (*Long Beach Equities, Inc. v. County of Ventura* (1991) 231 Cal.App.3d 1016, 1036, cert. den.) "Even where there is a very substantial diminution in the value of land, there is no taking. ([*MacLeod v. Santa Clara County* (9th Cir. 1984) 749 F.2d 541], 547-548, citing *Hadacheck v. Sebastian* (1915) 239 U.S. 394 [60 L.Ed. 348, 36 S. Ct. 143] — diminution in value from $800,000 to $60,000 not a taking; *William C. Haas v. City & Cty. of San Francisco* (9th Cir. 1979) 605 F.2d 1117, 1120 — diminution in value from $2 million to $100,000 not a taking.)" (*Long Beach Equities, Inc., supra*, 231 Cal.App.3d at p. 1036.)

Further, it is settled the preservation of some open space amidst populated areas is a legitimate exercise of the police power, intended to protect area residents from the negative effects of excessive urbanization. (*Agins v. Tiburon* (1980) 447 U.S. 255, 261 [65 L.Ed.2d 106].) Thus, the core issue presented by an " 'as applied' " challenge to a zoning restriction is whether the governmental exercise of its police power " 'went too far' " with respect to the specific piece of property before the court. (*Twain Harte Associates, Ltd., supra*, 217 Cal.App.3d at p. 82.)

Here, while the City imposed certain limitations on uses of the land which limitations have resulted in a diminution of the land's value, they do not rise to the level of a taking. (*HFH, Ltd., supra*, 15 Cal.3d at p. 518.) Even though the 1.97-acre area cannot be utilized for multiple family dwellings, it cannot be said the land has been taken. Contrary to the often-repeated assertion in Ramona's briefs, the City has not conscripted Ramona to maintain a public park on the property.

Moreover, the City has not prohibited all reasonable use of the property. The open space zoning allows various permitted and conditionally permitted uses on the site, including, most particularly, educational institutions. (Alhambra Mun. Code, § 23.34.030, subd. (1).) Thus, if Ramona wishes to expand its classroom facilities, add science laboratories, or build a gymnasium or dormitories, it could do so on the site. Accordingly, there has been no taking of the 1.97-acre portion of the parcel.

In response, Ramona asserts the northwest corner of the campus is not essential to the school's purpose and the baseball diamond will be relocated elsewhere. In other words, Ramona's priority is to maximize its proceeds through the sale of the 1.97-acre area for high density development. This argument is unavailing because Ramona's internal financial situation is not determinative of whether a taking has occurred.[6]

5. Contention re spot zoning not properly before us.

Ramona contends the City deprived it of equal protection of the laws by discriminatory spot zoning.[7] Ramona asserts its property is an island of open space completely

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[6] We observe that under Ramona's theory, it would be able to dismantle its property piecemeal by splitting the acreage into numerous smaller parcels, each of which would be too small to be viable as an open-space zone. Ramona then could claim inverse condemnation because the open-space zoning of the shrunken parcels would preclude any reasonable use of them.

[7] Spot zoning occurs where a small parcel is restricted and given less rights than the surrounding property, thereby creating an " 'island' " in the middle of a larger area devoted to other uses. (*Wilkins v. City of San Bernardino* (1946) 29 Cal.2d 332, 340; *Ross v. City of Yorba Linda* (1991) 1 Cal.App.4th 954, 960.)

surrounded by property zoned for residential development and so developed.

The issue has been waived. On review of a summary judgment, "the issues [are] framed by the pleadings, since it is these allegations to which the [summary judgment] motion must respond." (*Torres v. Reardon* (1992) 3 Cal.App.4th 831, 836.) Here, Ramona's complaint "was devoid of allegations to the effect the [open space classification] was arbitrary, unreasonable, or discriminatory." (*Twain Harte Associates, Ltd., supra*: 217 Cal.App.3d at p. 83.) Because no right to recover on the basis of spot zoning was pled in the complaint, we do not address the contention.

6. No merit to Ramona's contention the City has violated its right to free exercise of religion.

Ramona contends the City's "*de facto* land grab of the Property, directly and adversely affects Ramona Convent's ability to discharge its mission to pass on, through education, religious values to a new generation." Ramona emphasizes it "has no means other [than] proceeds [of] sale of the 1.97 acres to place itself on a financial basis that will ensure its continued operation."

The argument fails. There has been no land grab. As discussed above, there has been no taking of the 1.97 acres, which area merely is a portion of Ramona's undivided 19.17-acre parcel.

Further, the City has not interfered with Ramona's free exercise of religion. Ramona's precarious financial situation stems in part from a natural disaster and not from any action by the City. The City has no First Amendment obligation to rezone a portion of Ramona's property in order to ensure Ramona's solvency.

7. Liability of individual defendants not reached.

Ramona contends the trial court erred in finding the individual defendants, members of the Alhambra City Council and the city clerk, immune from the consequences of their unconstitutional conduct.

Because there was no deprivation of Ramona's rights, it is unnecessary to discuss the issue of the individual defendants' immunity.

DISPOSITION

The judgment is affirmed. Ramona to bear costs on appeal.

CERTIFIED FOR PUBLICATION

KLEIN, P.J.

We concur:

CROSKEY, J.

HINZ, J.

APPENDIX C

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 3 DATE: 01/10/94

Crosby, Heafey, Roach & May
Gideon Kanner
700 South Flower Street
Suite 2200
Los Angeles, CA 90017

RE: Ramona Convent of the Holy Names
vs.
Alhambra, City of
2 Civil B064755
Los Angeles NO. C755518

THE COURT:

Petition for rehearing denied.

APPENDIX D

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

Court of Appeal Second Dist.
FILED
SEP 4 1992
Joseph A. Lane, Clerk
_____ Deputy Clerk

RAMONA CONVENT OF THE HOLY NAMES,
Plaintiff and Appellant,
vs.
CITY OF ALHAMBRA, etc., et al.,
Defendants and Respondents.

2d Civil No. B054958

(Super. Ct. No. C755518)

APPEAL from a judgment of the Superior Court of Los Angeles County. Edward M. Ross, Judge. Affirmed.

Sullivan, Workman & Dee, Roger M. Sullivan and Henry K. Workman, for Plaintiff and Appellant.

Burke, Williams & Sorensen, Robert V. Wadden and Leland C. Dolley, City Attorney, for Defendants and Respondents.

Plaintiff and appellant Ramona Convent of the Holy Names (Ramona) appeals from that portion of the judgment denying its petition for a writ of mandate under sections 1085 and 1094.5 of the Code of Civil Procedure.[1]

Because substantial evidence supports the determination the proposed lot split would be inconsistent with the City of Alhambra's (City) general plan and because Ramona's denial of due process claim is moot, we affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Ramona operates a Catholic girl's school on a 19.17-acre parcel, which it owns, in the City. The property is both zoned as open space and is designated as open space under the land use element of the City's general plan.

In the 1987 Whittier earthquake the school's main building sustained extensive damage which required its replacement. To pay for this Ramona decided to sell a 1.97 acre portion of its property which had been used as a softball diamond.

Wonder Enterprises, Inc. (Wonder), a private developer, had an option to purchase the 1.97 acre site

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[1] All future section references are to the Code of Civil Procedure unless otherwise indicated.

On December 7, 1990, Ramona filed a notice of appeal from the minute order dated September 26, 1990. No appeal lies from an unsigned minute order denying a petition for a writ of mandate. Instead, the appeal must be taken from the judgment denying such petition. (See, §§ 1094, 1094.5, subds. (f) and (g); see also, §904.1.)

The judgment was entered on April 14, 1992. We therefore deem the appeal to be from that judgment. (Cal. Rules of Court, rule 2(c).)

on which it intended to construct 88 senior citizen residential units.

On May 10, 1989, Ramona filed an application (TP 20663) for a tentative tract map (TTM) which would provide for a lot split to divide the property into a 17.3 acre parcel and a 1.97 acre parcel.

About 10-14 days later, Scott (Lee), the City's planner, informed William Ells (Ells), Ramona's engineer, Ramona's application was incomplete because it did not include a development proposal. Lee and Ells agreed the application would be combined with the senior citizen housing proposal on the 1.97 acre site.

On June 15, 1989, Wonder sought sponsorship for the senior citizen project by filing applications (GPA-89-4 and TT 48062) with the City for a residential planned development permit, a change of zone and general plan amendment, and a TTM. Such sponsorship would have allowed Wonder to build 88 units under the City's density bonus incentives.

Ramona and the City then mutually agreed action on Ramona's application would be deferred until the issue of sponsorship was resolved.

At its July 24, 1989 meeting the City Counsel voted not to sponsor the proposed project. Absent such sponsorship, the maximum density would be 59 units.

In its letter dated August 7, 1989, Wonder withdrew its application for the 88-unit project. The City understood this to mean Ramona was also withdrawing its lot split application at this time as well since Ramona had agreed the two matters would be processed together.

On September 20, 1989, Ells informed Lee, Ramona wanted to proceed with the processing of the TTM application. The City reopened the processing of the application despite the fact it was unaccompanied by a proposed development project, which was unusual.

At the November 6, 1989 hearing, the planning commission found there was a mutual agreement to extend the time to act thereon, and thus, rejected Ramona's argument the application was "deemed approved" by the City's failure to act within the statutory time limits. The commission then denied Ramona's application.

On December 11, 1989, a hearing was held before the City Counsel on Ramona's appeal of that determination. Ramona reiterated its "deemed approved" argument at this time. In response Michael Paules (Paules), Director of Community Development, asserted Ramona acquiesced in any delay regarding the processing of its application. The matter was then continued to January 8, 1990 for further consideration.

On January 8, 1990, the City Counsel denied Ramona's application on the grounds it would not promote the City's goal of open space and it was inconsistent with its general plan.

On March 23, 1990, Ramona filed its action for, inter alia, a writ of mandate pursuant to sections 1085 and 1094.5.

On May 18, 1990, the City filed its answer.

On September 11, 1990, Ramona filed a motion for a hearing on its petition, which included a declaration by Ells.

On or about September 19, the City filed opposition. The declarations of Paules and Lee were submitted to show, inter alia, the City's time to act on Ramona's application was extended by mutual consent.

On or about September 25, 1990, the supplemental declaration of Ells was filed to refute the City's declarations.

On September 26, 1990, following a hearing, the trial court denied Ramona's petition for a writ of mandate.

Based on the City's declarations the court found the parties agreed to extend the time for acting on Ramona's application, and thus, the application was not "deemed approved" under section 66452.4 of the Government Code. The court also found no abuse of discretion in the denial of Ramona's application.

Issues presented by Ramona's contentions.

Two issues are presented by Ramona's contentions: (1) Does substantial evidence support the City's determination the lot split would be inconsistent with the general plan? and (2) Was Ramona denied a fair trial before the City Council and the trial court?[2]

DISCUSSION

1. Substantial evidence supports the finding the lot spit would be inconsistent with the general plan.

Ramona acknowledges the City's denial of its application must be upheld under section 1094.5 if substantial evidence supports the City Council's finding that the proposed lot split would be inconsistent with the general

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[2] Before the trial court Ramona asserted it was entitled to a writ of mandate (§ 1085) to compel the City to deem its TTM approved because the City failed to act on its application within the time set by law. (See Gov. Code, §§ 66452.1, subd. (b) and 66452.4.)

On appeal Ramona does not attack the sufficiency of the evidence to support the trial court's finding the TTM was not deemed approved because the parties by mutual consent extended the time for the City to act (Gov. Code, § 66451.1, subd. (b)). Instead, Ramona challenges that finding only to the extent it claims the lack of opportunity to present oral evidence denied Ramona of a fair hearing.

plan. (See, e.g., *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514-515.) It urges, however, the evidence is insufficient to support that finding.

The gist of Ramona's position is the proposed lot split cannot, as a matter of law, be inconsistent with the general plan's open space element[3] since "[a] simple lot split is inherently neutral with respect to potential land use" and "lot size is not part of the criteria for open space uses under the zoning ordinance or General Plan."

We find no merit to Ramona's position. The City was entitled to deny approval of a TTM if "the design . . . of the proposed subdivision is not consistent with the applicable general and specific plans." (Gov. Code, § 66474, subd. (b).) The reference to " '[d]esign' " includes "lot size." (Gov. Code, § 66418.) Thus, it is clear that lot size is a proper factor to be considered.

Moreover, it is not true a lot split is "neutral with respect to potential land use." A lot may be split into a parcel too small to support a specific use, e.g., an acre lot cannot support a golf course.

Contrary to Ramona's assertion otherwise, there was evidence, not mere "speculation," to support the determination the lot split would be inconsistent with the open space element of the general plan. Since there was no specific development proposal pending with regard to the application, the City was required to consider those uses permitted for open space which could be supported by a 1.97 acre parcel. In so doing, the City found there were no feasible open space uses for a parcel of that limited size.

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[3] The City's general plan environmental management element (open space element) requires: " '[A]dequate and accessible outdoor recreation and open space amenities' be provided."

The record is devoid of any evidence presented by Ramona as to what open space uses would be feasible for a lot that size despite the announcement of one planning commissioner at the November 6 hearing he would have no problem approving the application if he could be assured of a continued open space use for the property.

The only evidence concerning open space uses was submitted in the form of two staff reports, one of which was submitted to the Planning Commission and the other subsequently to the city manager.

In recommending rejection of the lot split the staff pointed out the property already had been subdivided once to make room for a condominium complex and there was a shortage of open space property within the City. The staff also had evaluated the possible open space uses for the 1.97 acre parcel and concluded a lot that size would not be likely to be conducive to any of those uses.

Based on the foregoing we find there was ample evidence to support the City's determination the proposed lot split would be inconsistent with the general plan and did not abuse its discretion in denying Ramona's application.

2. Ramona's denial of due process claim is moot.

Ramona contends it was denied a fair trial on the issue of whether it had agreed to extend the time for action on its application under the " 'deemed approved' " statute. (Gov. Code, § 66452.4.) Initially, Ramona complains it was denied a " 'fair hearing' " before the City Council on that issue within the meaning

of section 1094.5, subdivision (b),[4] and "fundamental due process principles" because the City council apparently met with the City Attorney in a closed session and "the matter of Ramona's alleged acquiescence [in the delay on its application] was decided 'off the record' and *sans* formal findings."

Ramona further complains it was denied due process at the trial level as well because no "plenary hearing at which oral testimony could be produced and adverse witnesses cross-examined" was conducted. Instead, the matter was decided on declarations, which is improper to prove a fact necessary to a judgment. (See *Reifler v. Superior Court* (1974) 39 Cal.App.3d 479, 484; *Lacraberg V. Wise* (1904) 141 Cal. 554, 556-557.) Ramona asserts "[a]lthough the hearing was procedurally activated by motion it was, in fact, a trial on a petition for writ of mandate, a remedy which is equivalent to a judgment."

Alternatively, Ramona contends even if a petition for a peremptory writ of mandate were a "law and motion hearing" matter which may be decided on affidavits and declarations (§ 2009; Cal. Rules of Court, rule 323(a)), Ramona should have been allowed to present oral testimony because the City's failure to raise the issue until the eve of trial excused Ramona's duty under California Rules of Court, rule 323, to move for permission to introduce oral evidence three days before the hearing.

---

[4] Section 1094.5, subdivision (b), provides in pertinent part: "The inquiry in such a case shall extend to the questions whether . . . there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

We find no merit to Ramona's contentions. Although briefs and argument are outside the record, they are reliable indications of a party's position on the facts as well as the law, and a reviewing court may make use of statements therein as admissions against the party. (*DeRose v. Carswell* (1987) 196 Cal.App.3d 1011, 1019; *Mangini v. Aeroject-General Corp.* (1991) 230 Cal. App.3d 1125, 1152; 9 Witkin, Cal. Procedures (3d 3d. [*sic*] 1985) Appeal, § 251, p. 258.)

Ramona concedes its denial of due process claim "may be somewhat academic because the 'deemed approved' statute could not rescue a lot split which was inconsistent with the general plan." Since we found, *ante*, the proposed lot split was in fact inconsistent with the general plan, Ramona's denial of due process claim is moot.

Moreover, Ramona's concession the actions of the City Council and the City Attorney were privileged (Gov. Code, § 54956.9) refutes its denial of due process claim as to the City Council. We also find Ramona's denial of due process claim at the judicial level is barred by its failure to make a motion to present oral evidence to the trial court.

DISPOSITION

The judgment denying Ramona's petition for a writ of mandate (§§ 1085, 1094.5) is affirmed. City to recover costs on appeal.

NOT TO BE PUBLISHED

KLEIN, P.J.

We concur:

CROSKEY, J.

HINZ, J.

APPENDIX E

LELAND C. DOLLEY, City Attorney,
CITY OF ALHAMBRA; and
BURKE, WILLIAMS & SORENSEN
ROBERT V. WADDEN, JR.
611 Sixth Street, 25th Floor
Los Angeles, California 90017
(213) 236-0600
Attorneys for Defendant
CITY OF ALHAMBRA

FILED
APR 14 1992
S H. Dempsey, Clerk
/s/

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

RAMONA CONVENT OF
THE HOLY NAMES,
Plaintiff,

vs.

CITY OF ALHAMBRA, et al.,
Defendants.

Case No. C 755 518

PROPOSED JUDGMENT

IT IS HEREBY ADJUDGED: that Judgment is granted for Respondent/Defendant City of Alhambra and against Petitioner/Plaintiff Ramona Convent of the Holy Name [*sic*] on all causes of action of Petitioner/Plaintiff's Petition/Complaint on the following grounds:

(1) On Petitioner/Plaintiff's First and Second Causes of Action:

On September 26, 1990, the Petitioner's Motion for a Peremptory Writ of Mandate was duly noticed and heard in Department 86 of the above-captioned court before the Honorable Edward M. Ross. The Petitioner was

represented by Roger M. Sullivan of Sullivan, Workman & Dee. Respondent was represented by Robert V. Wadden, Jr. of Burke, Williams & Sorensen.

After hearing arguments presented on behalf of Petitioner and Respondent, the Court entered an order denying the Motion for Writ of Mandate.

The Court made the following findings in denying the Writ of Mandate:

While it is true that Government Code § 66452.4 does provide for a "deemed approved" finding if the governing body does not take action on a proposed subdivision within 50 days, it is also true that G.C. § 66451.1 allows for an extension beyond that time by mutual consent of the parties.

Based upon the declarations of Michael Paules and Scott Lee, the Court finds that the parties did agree to extend the time for the subdivision proceeding until there was an agreement on the City participating in the increased density use of the property. It seems inescapably clear and logical that Petitioner would not want to go through the trouble and expense of pursuing a subdivision unless the contemplated use could be accomplished. Inasmuch as there was an agreement to extend the 50 days, the time did not start to run until September when Petitioner told the City it wished to proceed; all time limits were thereafter met. The city acted within its discretion in denying the application after public hearings were held on it.

The Court read and considered the declaration of William Ells and does not find it persuasive.

(2) On the Third and Fourth Causes of Action:

On September 19, 1991, Defendant's Motion for Summary Adjudication of the issues was duly noticed and heard in Department 60 of the above-captioned court before the Honorable Herbert M. Klein. Plaintiff was

represented by Roger M. Sullivan of Sullivan, Workman & Dee. Defendant was represented by Robert V. Wadden, Jr. of Burke, Williams & Sorensen. Both parties presented argument and the matter was taken under submission in order to enable the court to review the extensive pleadings and points and authorities.

On December 13, 1991, the Court granted Defendant's Motion for Summary Adjudication concerning the third and fourth causes of action of Plaintiff's complaint. Based upon all matters of record, points and authorities, statements of facts by counsel, the court made the following findings and orders:

Defendant's motion for summary adjudication as to the third and fourth cause of action is granted. The court finds that Plaintiff's third cause of action for inverse condemnation is not ripe in that Plaintiff has not pursued all available remedies to develop the use of the property commensurate with the existing permissible uses and has further failed to show that all of the property's beneficial uses were destroyed or prevented by Defendant's actions.

The court relies, in part, on the most recent case cited by Defendants, to wit: *Long Beach Equities, Inc. v. County of Ventura*, 231 Cal.App.3d 1016 and other authorities cited in Defendant's motion failed on August 20, 1991.

The court further finds as to the fourth cause of action individual defendants named in Plaintiff's complaint are immune from liability herein pursuant to 42 U.S.C. section 1983. See cases cited by Defendant in their motion, Ibid, in paragraph 5, starting at p. 10, l. 9, et seq.

DATED: APR 14 1992

/s/ HERBERT M. KLEIN
HERBERT M. KLEIN
Judge Pro Tem

PROOF OF SERVICE

1013, 2015.5 C.C.P. Revised 1/1/88

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 611 West 6th Street, 25th Floor, Los Angeles, California 90017.

On 5/18, 19 92, I served the foregoing document described as NOTICE OF ENTRY OF JUDGMENT on THE INTERESTED PARTY in this action

[ ] by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list:

[x] by placing [ ] the original [x] a true copy thereof enclosed in sealed envelopes addressed as follows:

Roger M. Sullivan
Sullivan, Workman & Dee
800 South Figueroa Street, 12th Floor
Los Angeles, CA 90017

[x] BY MAIL

[ ] *I deposited such envelope in the mail at _____, California. The envelope was mailed with postage thereon fully prepaid.

[x] I caused such envelope to be deposited in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

I am "readily familiar" with firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date

or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on 5/18, 1992, at Los Angeles, California.

[ ] **(BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of the addressee. Executed on ____, 19_, at _____, California.

[x] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[ ] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

MALCOLM J. SMITH
Type or Print Name

/s/ MALCOLM J. SMITH
Signature

* By mail signature must be of person depositing envelope in mail slot box or bag.

** For personal service signature must be that of messenger

APPENDIX F

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

DATE December 16 1991
HONORABLE Herbert M Klein Judge pro tem

None Deputy Sheriff C H Johnson, Deputy Clerk
Court Attendant None , Reporter
(parties and counsel checked if present)

C755 518
RAMONA CONVENT OF THE HOLY NAMES — Counsel for Plaintiff
vs.
CITY OF ALHAMBRA, et al — Counsel for Defendant

NATURE OF PROCEEDINGS:

FINDINGS AND ORDER RE MOTION FOR SUMMARY ADJUDICATION OF ISSUES

In the matter heretofore submitted on September 19, 1991, the Court rules in accordance with its Findings and Order signed and filed this date.

Copies of this minute order and the Orders are sent to counsel via United States Mail.

MINUTES ENTERED
DECEMBER 16, 1991
COUNTY CLERK

DEPT 60

MINUTE ORDER

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ORIGINAL FILED
DEC 13 1991
COUNTY CLERK

RAMONA CONVENT OF
THE HOLY NAMES,
Plaintiff,

vs.

CITY OF ALHAMBRA, et al.,
Defendants.

Case No. C 755 518

FINDINGS AND ORDER RE MOTION FOR
SUMMARY ADJUDICATION OF ISSUES

SULLIVAN, WORKMAN & DEE
By: ROGER M. SULLIVAN appeared as attorney for plaintiff.

BURKE, WILLIAMS & SORENSEN
By: ROBERT V. WADDEN, JR. appeared as attorney for defendant, CITY OF ALHAMBRA.

Defendant's motion for summary adjudication of issues was heard on September 19, 1991, before Herbert M. Klein, Judge Pro Tem. Both parties presented argument and the matter was taken under submission in order to enable the court to review the extensive pleadings and points and authorities.

Based upon all matters of record, points and authorities, statements of facts by counsel, the court makes the following findings and orders:

Defendant's motion for summary adjudication as to the third and fourth cause of action is granted. The court finds that plaintiff's third cause of action for inverse condemnation is not ripe in that plaintiff has not pursued all available remedies to develop the use of the property commensurate with the existing permissible uses and has further failed to show that all of the property's beneficial uses were destroyed or prevented by defendant's actions.

The court relied, in part, on the most recent case cited by defendants, to wit: *Long Beach Equities, Inc. v. County of Ventura*, 231 Cal.App.3d 1016 and other authorities cited in defendant's motion filed on August 20, 1991.

The court further finds as to the fourth cause of action individual defendants named in plaintiff's complaint are immune from liability herein pursuant to 42 U.S.C. section 1993. [*sic*] See cases cited by defendant in their motion, Ibid, in paragraph 5, starting at p. 10, l. 9, et seq.

The clerk of Department 60 is directed to mail a copy of these findings and orders to the attorney for each party. Defendant is ordered to give notice.

DATED: DEC 13 1991

HERBERT M. KLEIN
Judge Pro Tem

HERBERT M. KLEIN
Judge Pro Tem

HMK:vm

APPENDIX G

Chapter 23.34

OS (OPEN SPACE) ZONE

Sections:

23.34.010 Purpose.
23.34.020 Permitted uses.
23.34.030 Conditionally permitted uses.
23.34.040 Applicable regulations.

23.34.010 Purpose.

In order to establish and provide outdoor recreational and open space resources, and to prevent inappropriate development of areas which should be regulated to provide for scenic, recreational, historic, conservation, aesthetic or pubic health and safety uses, the regulations set out in this chapter shall be applicable to all lots classified in the OS zone. (Ord. 4057 § 2 (part))

23.34.020 Permitted uses.

No person shall use, nor shall any person permit the use of any property classified in the OS zone, for any use other than the following:

1. Public recreational uses such as parks, playgrounds and recreation areas, excepting buildings and structures thereon;

2. Golf courses and country clubs, excepting buildings and structures thereon;

3. Flood-control channels;

4. Public utility rights-of-way;

5. Creeks, rivers, spreading grounds and other similar water courses. (Ord. 4057 § 2 (part))

23.34.030 Conditionally permitted uses.

The following uses may be permitted subject to the approval of a conditional use permit pursuant to the provisions of Chapter 23.66 of this title:

1. Educational institutions;

2. Buildings and structures accessory to and located within the areas set forth in Section 23.34.020 above;

3. Agricultural and horticultural cultivation;

4. Water wells, reservoirs, tanks, dams treatment plants, gauging stations, pumping stations and any use normal and appurtenant to the obtainment, storage and distribution of water;

5. Utility substations and distribution stations;

6. Burial parks, cemeteries, columbariums and mausoleums;

7. Commercial antennae;

8. Fire and police stations;

9. Stables and riding academies;

10. Libraries and museums;

11. Outdoor nursery storage. (Ord. 4057 § 2 (part))

23.34.040 Applicable regulations.

All uses shall be subject to the applicable regulations of this Title, including standards which are located in the following chapters:

Chapter 23.42 — Property Development Standards;

Chapter 23.44 — Design Standards;

Chapter 23.48 — Landscaping Standards;

Chapter 23.50 — Sign Standards;

Chapter 23.52 —	Off-street Parking and Loading Standards;
Chapter 23.60 —	Temporary Use Permits;
Chapter 23.62 —	Planned Development Permits

(Ord. 4057 § 2 (part))

APPENDIX H

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

Court of Appeal Second Dist.
FILED
JUL 6 1994
Joseph A. Lane, Clerk
_____ Deputy Clerk

CITY OF ALHAMBRA,
Petitioner,
v.
THE SUPERIOR COURT OF
LOS ANGELES COUNTY,
Respondent;
RAMONA CONVENT OF
THE HOLY NAMES
Real Party in Interest.

No. B084886
(Super. Ct. No. 057997)
(Kathryn Doi Todd, Judge)

ORDER

BY THE COURT:

Having read and considered the petition for writ of mandate, filed June 22, 1994, we conclude the issues raised have been previously determined by this court in *Ramona Convent of the Holy Hames v. City of Alhambra* (Sept. 4, 1992) B054958 [nonpub. opn.] (hereafter *Ramona I*) and in *Ramona Convent of the Holy Names v. City of Alhambra* (1993) 21 Cal.App.4th 10 (hereafter *Ramona II*). We previously found proper City's denials

of Ramona Convent of the Holy Names's repeated applications for splitting the subject property and to rezone the property. In particular, we held denial of the applications does not constitute economic deprivation so onerous as to constitute a taking. We further held the internal financial situation of the applicant is not determinative of whether a taking has occurred.

The mere change in the request for rezoning the subject property for single family development rather than high density development has little to no impact on the fact the property is both zoned as open space and designed as open space under the land use element of City's general plan. It therefore appears to this court that the denial of City's motion for judgment on the pleadings is clear error under the previous holdings of this court in *Ramona I* and *Ramona II* and that the motion should be granted on res judicata and collateral estoppel grounds.

Because it appears that City's "entitlement to relief is so obvious that no purpose could reasonably be served by plenary consideration of the issue" (*Ng v. Superior Court* (1992) 4 Cal.4th 29, 35) *a third time* by this court, we hereby notify all parties that it is our present intention to grant the petition and to issue a peremptory writ of mandate in the first instance. (*Palma v. U.S. Industrial Fasterners, Inc.* (1984) 36 Cal.3d 171, 178.) The writ, if issued, will direct the respondent court to vacate its order denying City's motion for judgment on the pleadings and to enter instead an order granting the motion in accord with the decisions of this court in *Ramona I* and *Ramona II*.

We confer upon the respondent court the power and jurisdiction to change, modify and correct the order made on May 4, 1993, and to enter an order granting City's motion for judgment on the pleadings. If the respondent court vacates its May 4, 1994 order and

enters instead an order granting City's motion, a copy of the new order should immediately be forwarded to this court. Upon receipt of an order which is in conformity with the decisions of this court in *Ramona I* and *Ramona II*, this petition will be dismissed.

In the event the respondent court fails to enter a new and different order in conformity with the holdings of *Ramona I* and *Ramona II*, opposition to the issuance of a peremptory writ of mandate compelling the respondent court to do so may be filed no later than July 20, 1994. Any reply must be filed on or before August 1, 1994.